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Supreme Court of the United States

OCTOBER TERM, 1954

No. 379.....

EARL WEBB, as President of SIGMA TAU GAMMA, an unincorporated Association, and all others similarly situated, and DELTA KAPPA, INC., PHI SIGMA EPSILON, ALUMNI ASSOCIATION OF IOTA OF ALPHA KAPPA KAPPA, INC., PI KAPPA SIGMA, DELTA SIGMA EPSILON SORORITY, ALPHA SIGMA TAU SORORITY, THETA SIGMA UPSILON SORORITY and ROGER MUELLER, as Intervenors, *Plaintiffs-Appellants,*

—*vs.*—

STATE UNIVERSITY OF NEW YORK, William S. Carlson, President, Charles Garside, et al., comprising the Trustees of State University of New York, *Defendants-Appellees.*

IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM AND BRIEF THEREON

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STATE UNIVERSITY OF NEW YORK, William S. Carlson, President, Charles Garside, et al., comprising the Trustees of State University of New York,

Defendants-Appellees.

IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM, AND BRIEF THEREON

MAY IT PLEASE THE COURT:

Now come the appellants in the above entitled cause, by their counsel, and move that appellees' motion to dismiss or affirm be dismissed and denied, that this cause be set down for argument, that the judgment herein be reversed,

and such relief be accorded as to the Court seems just and proper.

Statement of the Case

This action was commenced on November 25, 1953, in the District Court for the Northern District of New York, seeking a declaratory judgment and an injunction. A motion to dismiss was brought on the 4th day of January, 1954. Thereafter certain amendments to the complaint were allowed, orders were granted, permitting seven other associations or corporations and an individual to intervene. On April 27, 1954, Hon. James T. Foley, a District Judge for the Northern District of New York, granted the application of plaintiffs'-appellants herein for the convening of a three-judge court (28 U. S. C. § 2281), reserving the motions to dismiss filed by defendants for the consideration and decision of the Statutory Court.

Circuit Judge Augustus N. Hand, together with District Judge Stephen W. Brennan and District Judge James T. Foley heard the evidence at the Federal Building, in the City of New York, on the 25th day of May, 1954. A written decision and judgment was handed down on June 7, 1954. This decision and judgment did not question the jurisdiction of the Court. From that judgment an appeal was perfected and allowed by Judge Stephen W. Brennan to this Court on the 25th day of June, 1954 (28 U. S. C., § 1253). Appellees served a motion to dismiss or affirm on the 22nd day of July, 1954.

The plaintiffs challenged the first and third paragraphs of the resolution quoted below, passed by the Trustees of State University of New York on the 8th day of October, 1953, at the request of defendant William S. Carlson.

President of State University. The resolution is as follows:

> "RESOLVED that no social organization shall be permitted in any state-operated unit of the State University which has any direct or indirect affiliation or connection with any national or other organization outside the particular unit, and be it further
>
> "RESOLVED that no social organization, in policy or practice, shall operate under any rule which bars students on account of race, color, religion, creed, national origin or other artificial criteria; and be it further
>
> "RESOLVED that the President be, and hereby is, authorized to take such steps as he may deem appropriate to implement this policy, including the determination of which student organizations are social as distinguished from scholastic or religious, and his decision shall be final."

It is admitted that plaintiffs were granted no notice, nor hearing, or right to be heard.

ARGUMENT

I

Appellants fully appreciate that this judgment cannot be reversed unless they show that the Circuit Court abused its discretion in granting the judgment herein. (Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 318).

The Constitution of the State of New York, under heading "Education", Article XI, provides:

"(Regents of the University) § 2

"The corporation created in the year One Thousand Seven Hundred Eighty-four under the name of the Regents of the University of the State of New York, is hereby continued under the name of the University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents. (Formerly § 2 of Art. 9. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)"

Under "Article V, § 4——. The head of the department of education shall be The Regents of the University of the State of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department."

("The University of the State of New York", mentioned above, is not to be confused with "State University of New York", the action of the trustees of which is herein assailed.)

Section 355 of the Education Law of the State of New

York was added by chapter 695 of the Laws of 1948, as amended, to take effect September 1, 1953. Both the original act and amendments provide as follows:

"§ 355. Powers and Duties of Trustees—Administrative Functions.

"2. *The State University Trustees are further authorized and empowered, subject to the general supervision and approval of the Board of Regents:*

"b. To make and establish and from time to time alter and amend such rules and regulations, not inconsistent with law, for the government of the State University and the institutions therein."

Upon the trial of this action, plaintiffs' counsel offered in evidence, and the court received, a copy of an affidavit setting forth the resolution verbatim and asking Frederick A. Morse, Secretary to Board of Regents, whether the Board of Regents had ever approved of this action of the Trustees of State University. (Record page). A copy of the letter from Mr. Morse, Secretary to the Board of Regents, dated April 20, 1954, was read into the record as follows:

"Clifford H. Searl, Esq.
Hotel Syracuse
Syracuse, New York

"Dear Mr. Searl:

"This will acknowledge your letter of 19 April respecting action taken by the Trustees of the State University of New York. I am passing your letter on to Doctor Charles A. Brind, Jr., counsel to this department for his reply.

Very sincerely,

F. A. MORSE"

(Record Page).

Under date of April 26, 1954, Mr. Brind wrote Clifford H. Searl as follows:

"Dear Mr. Searl:

"This acknowledges the receipt of your letter of April 19, addressed to Mr. Morse, which has been referred to me for reply.

"You are advised that the Regents have not taken any action in respect to the resolution to which you refer, the same having never been referred to the Regents for their consideration.

Very truly yours,
CHARLES A. BRIND, JR."

Plaintiff's counsel then asked the Court that this affidavit be received as part of the record in the case. The Presiding Judge then asked defense counsel if there was any objection. To this inquiry defense counsel replied:

"No, there is no objection, Your Honor, provided we can submit certified copies of letters which indicate they had given a prior general approval to matters of this kind." (Page Record).

No such letters were offered by defendants. One of two exhibits offered by defendants, a circular (Defendants' exhibit "A") contains the certificate of incorporation of State University and the data leading up to its adoption. This exhibit demonstrates the fact that the Regents is the main governing body of the State Educational Department, to which all action of the Trustees of the State University is subject. The other exhibit, Exhibit "B", consisted of a statement issued by defendant Carlson.

As this resolution *has never been approved by the Regents*, there is no basis for a finding that it is legal, and a

judgment based on its legality cannot stand, we respectfully urge.

Such power as defendants claim the President and Board of Trustees of State University of New York were granted in the instant case, without the approval of the Board of Regents, would clearly be an unconstitutional delegation of legislative power. (Schechter Corp. v. United States, 295 U. S. 495).

II

Notice and opportunity to be heard are indispensable to a fair trial, whether the case be criminal or civil. (Anti-facist Committee v. McGrath, 341 U. S. 123.)

Does the resolution here adopted deprive the appellants of any property right without due process of law, contrary to the requirements of the Fourteenth Amendment?

Disregarding for the moment the loss suffered by other plaintiffs through failure to receive dues and initiation fees, we will only consider the inevitable loss to the Alumni Association of Iota of Alpha Kappa Kappa. The record shows this society was incorporated by physicians in Syracuse in 1912 and that their chapter house has been leased to the active chapter for over forty years. The membership is confined exclusively to medical students. The house is furnished throughout. Donald F. Mullin, a qualified real estate expert, testified that the sound value of the structure as a fraternity house was $18,000; that because of its use it would depreciate in value because of this edict to the amount of $12,000. It could not well be converted to use as a rooming house, or any other purpose. To convert to a rooming house would cost $11,800.

The active chapter pays to this Alumni Association as rent $1,500 a year. In 1953 the Alumni Association paid $2,840.00 for permanent improvements and the house is insured for $30,000. The fraternity became a part of Syracuse University years ago and has remained as such until the State University recently took over. Now both the alumni and active chapter are out.

Reference is hereby made to the following authorities dealing with the question of notice and hearing:

> *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 419.
>
> *Anti-facist Committee* v. *McGrath*, 341 U. S. 123.

A corporation may raise the issue of due process, (*Wheeling Steel Works* v. *Glander*, 337 U. S. 562, 574).

As said in *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190:

> "Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed."

Counsel for defendants cites *Bowles* v. *Willingham*, 321 U. S. 503 as authority for the statement that the promulgation of a legislative regulation does not require notice and hearing. A reading of the opinion in the case of *Bowles* v. *Willingham* will show that *Avant* v. *Bowles* (139 F. (2d) 702) is cited. A portion of the opinion in the latter case, at page 707, reads:

> "It may well be that the due process clause requires notice and hearing to the individual to be affected before the exercise of such a power."

III

Appellants have demonstrated that neither in their constitutions nor in practice do they in any way discriminate because of race, color, religion, creed, national origin, or other artificial criteria. Therefore, the only logical conclusion that can be arrived at is that the action of the trustees is unreasonable and arbitrary.

In fact, the evidence discloses that one chapter at Oswego, New York, has elected a colored man as president. A fraternity picture, plaintiff's exhibit 21, shows two colored boys, while others testified they have initiated Chinese, Japanese and Indians. All chapters have members of the Catholic, Protestant and Jewish faiths.

IV

A Board possesses such powers, and such only as have been expressly conferred by statute, or are necessarily implied from those so conferred. (Wright v. Board of Education of St. Louis, 295 Mo. 466; 246 S. W. 43).

This statement brings up immediately a discussion of the facts in *Waugh* v. *Board of Trustees of University of Mississippi* (237 U. S. 589). In the *Waugh* case the legislature had passed an act expressly abolishing all Greek letter fraternities and prohibiting them from existing in the institution.

Counsel for defendants has recited in his brief some of the facts in that case. The Court there stated:

> "It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to *the limitations of the law.*"

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In the instant case it can properly be urged that as the legislature inserted in the powers granted to the Board of Trustees of State University to make rules, it, by the same act, specifically provided that they might adopt only such rules as met the approval of the Board of Regents. Without such approval, no such rule could exist.

To this effect the court in *Wright* v. *Board of Education of St. Louis, supra*, has held that a rule similarly passed was void.

The headnote of the case recites:

> "*Express Prohibition: Distinction.* In determining the power of a public school board, under a general statute authorizing it to make rules for the government of the school, to prohibit high school pupils from becoming members of Greek-letter fraternities, decision *based on an express statute forbidding the organization of such societies* or membership therein *furnish no guide.* Nor do decisions based on statutes which give to school boards general charter powers not reviewable by the courts."

To the same effect see *Morris et al* v. *Vandiver et al.* (145 Southern Rep. 228). There Section 6676 of the State Code provided that:

> "The Trustees shall have control of the property, elect and fix salaries of all teachers of the school, and shall have full power to do all things necessary to the successful operation of said school." (p. 231).

Held, that such board of trustees was without power to enforce payment of athletic, literary and library fees as a condition precedent to the rights of a student to enter school. (This case cites the *Wright* case. It also cites

many authorities throughout this country to the same effect).

One other distinction in the *Waugh* case is worthy of mention. The opinion in the case contained this statement:

> "But counsel overlook that it is an obvious principle of construction, and sometimes of justice, that laws are not to be construed retrospectively. The trustees regarded and followed the principle and left undisturbed the students already in the university—it was based on an obvious and rational distinction, and the Supreme Court sustained its competence."

Then follows:

> "—the board of trustees of the University adopted an order which recited that the board desired it to be understood that the statute was 'not to be construed to apply to students already entered and who conducted themselves with that decorum always expected of Southern gentlemen.'"

In the instant case the resolution of the Trustees has not respected this proviso that the resolution should not be construed *retrospectively*, for not only the letter of Dr. Rice, president of Buffalo Teachers' College (see stipulation), but the record indicates that the students already in college should disassociate from the national by June, 1954.

Judge Foley, District Judge, rendered his opinion in the lower court on April 27, 1954. Therein he dealt with defendants' motion for dismissal, based on the argument that the questions sought to be raised were so manifestly unsubstantial in the light of controlling decisions as to warrant no further argument. After discussing for some

length the *Waugh*, *Hughes*, *Hamilton* and *Pyeatte* cases, he stated:

> "Frankly, under this state of the law, I do not find clear uniformity and consistency which to my mind forecloses automatically the position assumed by the plaintiffs in their pleadings."

The Court was justified in this statement. In *Hamilton* v. *Regents*, 293 U. S. 245, at page 257 the Court states:

> "But by the California *constitution* the regents are, with exceptions not material here, fully empowered in respect of the organization and government of the university, which, as it has been held, is a constitutional department or function of the state government.
>
> "And the appellees insist that this appeal should be dismissed for the want of a substantial federal question. But that contention cannot be sustained; for we are unable to say that every question that appellants have brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for lack of substance."

In each one of the cases cited by defendants the action was either taken as provided in the State Constitution or in pursuance to an express State Statute authorizing such act.

Appellants seriously urge that the national fraternity system, which has existed in American colleges for over one hundred and twenty-five years, and has included in its membership many of the finest minds in the country among whom are several presidents of the United States, should not be arbitrarily thrown out without an opportunity to be heard by the highest Court in our land.

BLEED THR

Therefore, as the Trustees of State University have not complied with the provisions of the statute, requiring approval by the Board of Regents, the supreme educational body of the state, we respectfully maintain that the action taken by the defendants-appellees must fail.

Dated: July 31, 1954.

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